IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5517 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES.

2 To be referred to the Reporter or not ? YES.

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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VINODBHAI JAGJIVAN PATADIYA - Petitioner(s)
Versus
NARAYANBHAI JAGJIVAN PATADIA & 2 - Respondent(s)

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Appearance :
MR GHANSHYAM THURIA for Petitioner(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1 - 2.
MR RAVINDRA SHAH for Respondent(s) : 1,
MRS KANAN R SHAH for Respondent(s) : 1,
MR BD KARIA for Respondent(s) : 2,
MR UMANG OZA, AGP. for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 24/09/2007

ORAL JUDGMENT

1 The petitioner and respondent No.1 herein are real

brothers. One deceased Prabhavatiben J.Patadiya, mother of both the petitioner and respondent No.1, was a member of respondent No.2-Society since 1963. Late Smt. Prabhavatiben nominated the petitioner herein as her nominee in relation to plot No.32 in Vibhag No.1 i.e. property held by deceased Prabhavatiben. She expired on 4.9.1979. According to the petitioner vide applications dated 24.3.1981 and 25.3.1981 the petitioner called upon respondent No.2- Society to enter his name in records but, despite the fact that the nomination was registered with respondent No.2-Society, the application for entering the name of the petitioner in the records of the Society vice deceased Prabhavatiben was not accepted by respondent No.2-Society. Subsequently notice dated 6.7.1981 through an Advocate came to be served by the petitioner. On 22.11.1981 respondent No.2-Society informed the petitioner that the nomination of petitioner was cancelled and name of respondent No.1 as member was to be inserted in the records of respondent No.2-Society as per resolution dated 3.5.1981.

2 The petitioner therefore approached the Board of Nominees vide Lavad Case No. 4 of 1982 seeking declaration that resolution dated 3.5.1981 of respondent No.2-Society was illegal and without jurisdiction and also for inserting the name

of the petitioner, being the nominee. After hearing the parties the Board of Nominees allowed the Lavad Suit vide judgment and award dated 13.8.1993.

3 Respondent No.1 preferred Restoration Application No. 176 of 1993 on 28.9.1993. The said application was rejected by Board of Nominees by a reasoned order dated 6.12.1994. It appears that thereafter various proceedings took place before the Tribunal and this Court by way of challenge by respondent No.1 qua order dated 6.12.1994 passed by the Board of Nominees. Suffice it to state that after a chequered litigation ultimately the Appeal before the Tribunal stood revived.

4 Vide impugned order dated 21.2.2006 the Tribunal has confirmed the order made by Board of Nominees rejecting Restoration Application No. 176 of 1993. Thereafter, the following observations have been made by the Tribunal :

> *"However, this tribunal can go into the merits of the original judgment of the learned nominee in lavad case No. 4/82 in the appellate jurisdiction and pass appropriate order. The appellate jurisdiction can be exercised under Regulation-23 and Regulation-27 to go into the merits of the judgment of the learned nominee to achieve finality of the matter in dispute.*

Similar powers can be exercised under CPC Order 41 read with Sec.150(12) and in particular Order 41 Rule 33 which is parallel to Regulation-27. Therefore we have entered into the merits of the lavad case and it is found that learned nominee has no jurisdiction to entertain dispute, for which, powers are vested with the Civil Court who is competent to decide the question of disputed nomination or will or succession and the learned nominee has no jurisdiction since the succession law is a special law for succession matters and Sec. 31 of GCS Act gives limited powers to decide succession matters by the society in a summary manner and not to adjudicate and exercise powers of Civil Court. Therefore we pass the following order :

O R D E R

Appeal No. 387/94 is allowed. The order of the learned nominee in restoration application No. 176/93 dated 6.12.94 is confirmed. However, the judgment and award of the learned nominee in lavad case No. 4/82 dated 13.8.93 and 14.9.93 are quashed and set aside for want of jurisdiction u/s 93. However, the status quo for the disputed property be maintained by the appellant, respondent No.2 i.e. the society and respondent no.1 for one month for approaching Hon'ble High Court. No order as to cost.

Given and pronounced on :21/02/2006.

Sd/- *Sd/-*
(V.R.Jadav) *(R.M.Thakker)*
President *Member* ''

5 The present petition has been filed with the limited grievance qua the aforesaid observation made by the Tribunal. The learned Advocate for the petitioner, during course of hearing, has after setting out the historical facts

assailed the impugned order of Tribunal on the ground that once the Tribunal had confirmed the order made by the Board of Nominees the Tribunal could not have passed any further orders on merits, as in fact, no appeal had been filed by any party including respondent No.1, against the original order made by the Board of Nominees in Lavad Case No. 4 of 1982 on 13.8.1993.

6 Mr. Ravindra R.Shah, learned Advocate for respondent No.1 has supported the order of the Tribunal on the ground that the Tribunal was well within its jurisdiction in passing the order in the manner as it did. In support of the proposition he has placed reliance on judgment dated 1.8.2001 rendered by this Court between the same parties in Special Civil Application No. 1340 of 1999 read with order dated 8.11.2001 in Misc. Civil Application No. 1798 of 2001 to submit that this Court had directed the Tribunal to hear and decide the appeal on merits of the matter. He has further placed reliance on provisions of Regulation No. 27 of the *Gujarat State Co-operative Tribunal Regulations, 1964* as well as Order 41 Rule 33 of the *Code of Civil Procedure 1908* in support of the submissions made. Attention was also invited to the decision of the Apex Court in the case of *Delhi Electric Supply*

Undertaking Vs. Basanti Devi and Another, AIR 2000 SC 43 with special reference to the observations made in paragraph No.18 of the judgment to submit that the Appellate Court in a proper exercise of judicial discretion is required to determine all questions urged in order to render complete justice between the parties. He therefore submitted that in the present case the impugned order made by the Tribunal was the correct order considering the fact that the same was in furtherance of substantial justice. Lastly it was submitted that under the interim order made by this Court on 27.3.2006 respondent No.1 has wrongly been directed by the Court to approach the Civil Court for establishing the right of successor of the deceased, but in fact, it was the petitioner who ought to have been directed to establish such a right.

7. Mr.B.D.Karia, learned Advocate appearing on behalf of respondent No.2-Society has stated that the Society is ready and willing to comply with the award made by the Board of Nominees and has already taken necessary steps in this regard, but, due to pending litigation the Society has refrained from taking any further action in the matter. It is stated that respondent No.2 – Society is ready and willing to act in accordance with law and comply with whatever directions the

High Court may issue.

8. While admitting the petition on 27.3.2006 the Court had made the following operative order :

*"3. Hence **Rule.** Mr. Pandya, learned Assistant Government Pleader waives notice of Rule for respondent No.3. By interim order the operation and implementation of the impugned Judgment of the Tribunal is stayed in toto and so far as the Award of the learned Nominee is concerned, the same shall continue with the clarification that the petitioner is continued to represent the properties as nominee and not as the successor, in absolute, of the deceased. It is further clarified that that the respondent No.1 shall be at liberty to resort to appropriate proceedings before the Civil Court establishing the successory right over the property and with a view to enable the respondent No.1 to approach before the Civil Court for establishing the successory right, status quo as existing today over the property in question shall be maintained by the petitioner for a period of two months from today. In the event the Civil Court passes the order in either way, the rights of the parties shall stand governed accordingly. D.S. Permitted for respondent Nos. 1 & 2.*

Sd/-
(Jayant Patel, J.)"

9. Having heard the learned Advocates for the parties, it is apparent that the Tribunal has exceeded its jurisdiction whie passing the impugned order dated 21.2.2006 in as much as an order which was not under challenge before the Tribunal, viz. order dated 13.8.1993 in Lavad Case No.4 of 1982 could not have been modified/interfered with in any manner by the Tribunal. The Tribunal has failed to appreciate that the only challenge before the Tribunal was whether the Board of Nominees was justified in rejecting the Restoration Application. Once the Tribunal came to the conclusion that the Restoration Application filed by respondent No.1 before the Board of Nominees was rightly rejected by the Board of Nominees the Tribunal could not have entered into merits of the matter for the simple reason that the same was already concluded and till the point of time the suit was restored to file there would be no occasion either for the Tribunal or, for that matter even the Board of Nominees, to enter into any discussion on merits of the controversy between the parties and make any observations. The powers of the Tribunal, in the nature of inherent powers to prevent injustice, even if such powers are available to the Tribunal cannot take within its scope the proceedings which are not alive or before the Tribunal. Once the Board of Nominees has rejected the

Restoration Application and the said order had been confirmed by the Tribunal no other issue was alive and the Tribunal could not have entered into any discussion or made any observation qua merits of the dispute between the parties. In the result, the aforesaid order to the extent reproduced hereinbefore on merits of the dispute made by the Tribunal is quashed and set aside while rest of the order made by the Tribunal whereby the order of Board of Nominees rejecting the Restoration Application is confirmed by the Tribunal does not call for any intervention and stands confirmed.

10 In so far as reliance by respondent No.1 on earlier judgment of the Court dated 1.8.2001 (supra) read with earlier order dated 8.11.2001 (supra) is concerned it is apparent that the said judgment and order have to be read in the context of controversy brought before the Court viz. decision of the Tribunal in rejecting this very appeal ex-parte without hearing respondent No.1. Therefore, when the Court states that the appeal has to be heard on merits by the Tribunal it is the appeal against order made by Board of Nominees rejecting Restoration Application and merits of that appeal. In other words, whether the Board of Nominees was justified in rejecting the Restoration Application or not. At the

cost of repetition, it is required to be stated that the subject matter of appeal cannot travel beyond the scope of the original proceedings. In the present case the original proceedings pertained to Restoration Application filed by respondent No.1 before the Board of Nominees and rejection thereof. The Tribunal could have either confirmed the order made by the Board of Nominees rejecting the Restoration Application, or allowed the appeal and granted Restoration Application, or set aside the order made by Board of Nominees and directed the Board of Nominees to hear the Restoration Application afresh. But in no circumstance, could the Tribunal have travelled beyond the subject matter of appeal viz. the order of rejection of Restoration Application.

11. Reliance on Regulation No.27 of the Regulations as well as provisions of Order 41 Rule 33 of the Code of Civil Procedure is misplaced. The said provision specifically deals with a situation where the subject matter of appeal is the same, viz. as was in the original proceedings, but either some part of the order in original proceedings is not in challenge, or some of the parties to the original proceedings are not parties to the appellate proceedings. The illustration provided below Rule 33 of Order 41 of C.P.C. makes this

aspect more than abundantly clear and nothing further is required to be stated in this context.

12. The Apex Court decision in the case of *Delhi Electric Supply Undertaking (supra)* instead of supporting the stand of respondent No.1 goes to reiterate the position in law that the question raised must properly arise out of judgment of the lower Court. While interpreting Rule 33 of Order 41 of C.P.C. the Court has stated that requirement of the Rule is (i) that the parties before the lower Court should be there before the Appellate Court and; (ii) the question raised must properly arise out of the judgment of the lower Court. In the present case, admittedly the question raised before the Tribunal can only be in relation to the order of Board of Nominees rejecting the Restoration Application. Whether the facts and circumstances of the case as set out in Restoration Application filed by respondent No.1 before the Board of Nominees warranted restoration of the lavad suit or not was the only question that was before the Tribunal. The Tribunal cannot be permitted to exceed its jurisdiction.

13. Even otherwise, assuming for the sake of argument that the Tribunal could have gone into merits of the dispute, the

decision is contrary to law. The petitioner had never staked his claim before respondent No.2-Society on the basis of inheritance. The petitioner had been nominated by deceased Prabhavatiben; such nomination having been lodged with the Society, the petitioner sought insertion of his name as a nominee. Thus the dispute between the petitioner and respondent No.2-Society was limited.

14. As already stated by this Court while admitting the petition it will be open to respondent No.1 to initiate appropriate proceedings in accordance with law for establishing the right of respondent No.1 in the property of the deceased, while at the same time the right of the petitioner is restricted to the rights available to a nominee under law and even the petitioner cannot claim any absolute right in the property in question. Respondent No.2 – Society is therefore directed to enter the name of the petitioner in the records of the Society on the basis of nomination made by deceased Prabhavatiben with an endorsement that the same is ultimately subject to the rights of inheritance as may be established in accordance with law.

15. The petition is allowed accordingly in the aforesaid terms. Rule made absolute. There shall be no order as to costs.

Sd/-
(D.A.Mehta, J)

m.m.bhatt